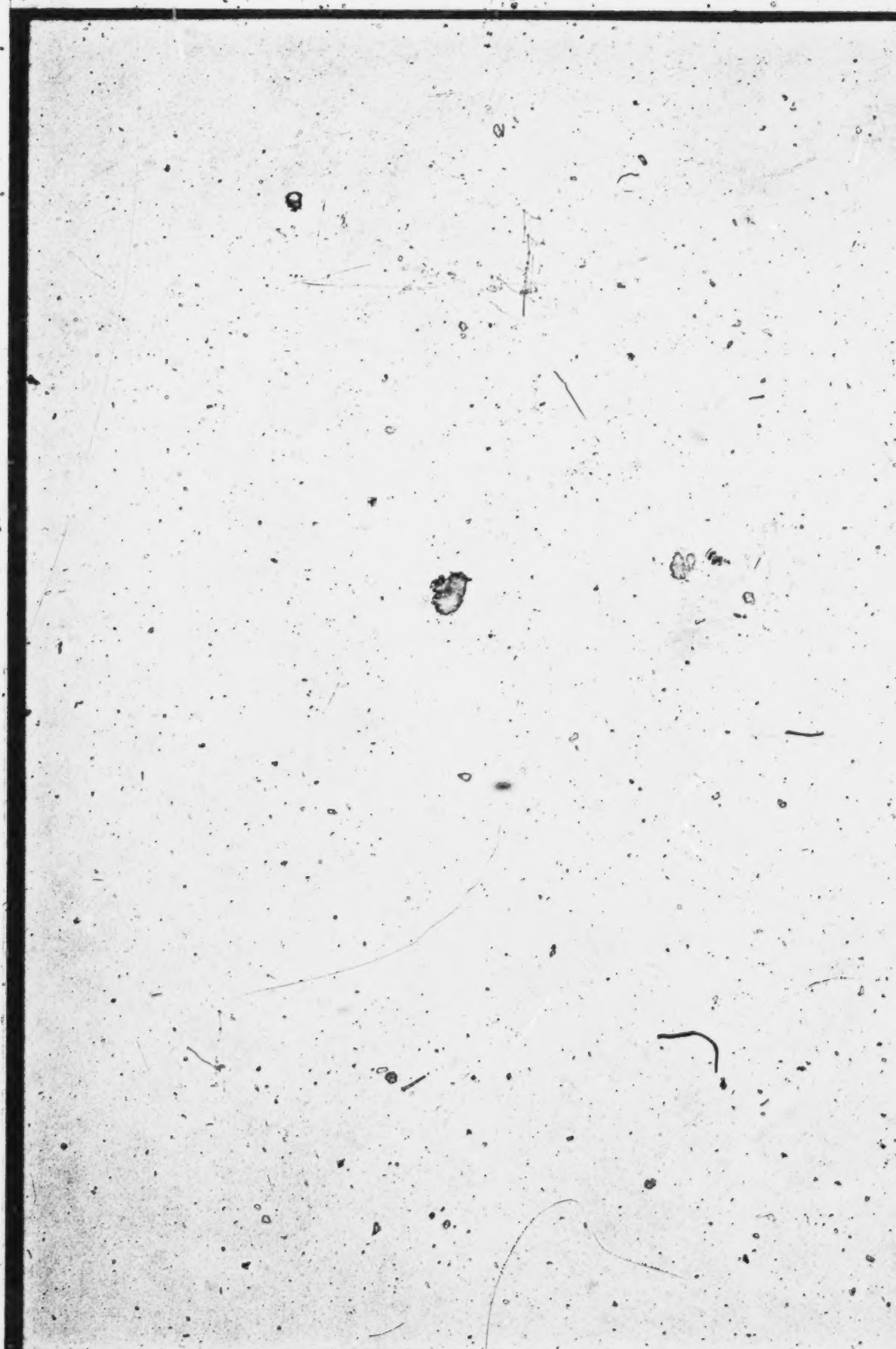

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In the

Supreme Court of the United States

October Term 1966

No. 260

I. M. AMUSEMENT CORP.,

Petitioner,

v.

STATE OF OHIO,

Respondent.

RESPONDENT'S MOTION TO DISMISS APPEAL

Now comes the State of Ohio, Respondent herein, by Melvin G. Rueger, Prosecuting Attorney of Hamilton County, Ohio, and Calvin W. Prem, Assistant Prosecuting Attorney of Hamilton County, Ohio, and respectfully moves this Court for an order dismissing the within appeal for the reasons that:

(a) the appeal does not present a substantial federal question.

(b) the judgment rests upon an adequate non-federal basis.

OPINIONS OF THE COURTS BELOW

The Petitioner's brief correctly cites the opinions and judgments below.

JURISDICTIONAL STATEMENT

The Petitioner's appeal, from the judgment of the Supreme Court of Ohio, challenges its conviction for violation

of *Section 2905.34 of the Revised Code of Ohio* under the provisions of the First, Fifth and Sixth Amendments to the Constitution of the United States of America.

QUESTIONS PRESENTED

The Petitioner submits the following five (5) questions in support of its Petition for Writ of Certiorari:

(1) Is the movie in question protected by the First Amendment to the Constitution of the United States of America as material being not utterly without redeeming social value, being not patently offensive and falling within the contemporary community standard as not appealing to prurient interest?

(2) Did the procedures followed in obtaining the conviction in the trial court offend the First Amendment to the Constitution of the United States of America and deny the Petitioner due process of law and a fair trial in violation of the Fifth and Sixth Amendments to the Constitution of the United States of America, when no testimony or evidence was presented by the State of Ohio on any alleged obscene aspect of the motion picture in question or pandering by the defendant, and thereafter defendant was barred from presenting evidence from an expert witness, qualified as learned in the theatrical and motion picture arts, as to contemporary community standards of tolerance and acceptance in motion picture depiction?

(3) Does the First Amendment to the Constitution of the United States of America prohibit the conviction of a corporate entity, charged with exhibiting an obscene motion picture, without any showing by the State of any knowledge of managerial agents of said corporation of even the existence of the picture in question, nor any showing of any course of "pandering" conduct or intent upon the

part of the corporate entity in relation to either the picture in question or in any manner whatsoever?

(4) Does Ohio's statutory definition of obscenity (O. R. C. 2905.371) which does not provide for any consideration of redeeming social importance or patent offensiveness offend the First Amendment to the Constitution of the United States?

(5) On an appeal which raises the constitutional question of the specific obscenity of a given motion picture, did the procedures followed in this cause, to-wit, the Supreme Court of Ohio dismissing the said appeal as raising no substantial constitutional question, without ever allowing the submission or certification of the motion picture itself to it, violate the First and Fourteenth Amendments to the United States Constitution?

STATEMENT OF THE CASE

A. Preliminary Statement.

The I. M. Amusement Corporation, an Ohio corporation engaged in the business of operating a motion picture theater, known as "Imperial Follies", in Cincinnati, Ohio, was indicted by the Grand Jury of Hamilton County, Ohio, and charged with a violation of *Section 2905.34, Revised Code of Ohio* (exhibiting an obscene motion picture film).

A plea in abatement, motion to dismiss the indictment, and other preliminary matters were thoroughly argued and briefed, and were ruled upon by the trial court, prior to the time of arraignment.

Counsel for I. M. Amusement Corporation was permitted to enter his (corporate) client's appearance and plea of "not guilty" at the arraignment, and was further permitted to state his client's election to be tried by the trial court without a jury.

Upon conclusion of the case, the trial court determined that the motion picture film fell within the statutory definition of "obscenity" and found the defendant (Petitioner) to be guilty as charged.

On appeal to the Ohio First District Court of Appeals, the judgment of conviction was affirmed and, on appeal to the Supreme Court of Ohio, the matter was dismissed sua sponte on the ground that there was no substantial constitutional question.

B. Statement of Fact:

The I. M. Amusement Corporation, an Ohio corporation, operated a motion picture theater, known as "Imperial Follies", at 282 and 284 West McMicken Avenue, Cincinnati, Ohio.

On several dates prior to June 12 and 13, 1963, Mr. William Berger, an officer of said corporation, employed in a managerial capacity in the operation of its theater business, advertised the showing of a film, called "Beautease Models", at said theater. The said advertisements appeared in a newspaper of general circulation in the Cincinnati area. "Beautease Models" is another name for the film "Artists' Models", which film was admitted into evidence in the trial of the within case.

Cincinnati police officers, who were assigned to the Vice Control Bureau, went to the Imperial Follies Theater on June 12 and 13, 1963, paid admissions and viewed the film, "Artists' Models", being projected upon the screen. Other persons were in the theater viewing said motion picture at the same time. The police officers confiscated the film and charged I. M. Amusement Corporation with exhibiting an obscene motion picture film in violation of *Section 2905.34 of the Revised Code of Ohio.*

A trial by jury was waived and the trial court, after

hearing the evidence and testimony, and after viewing the motion picture film in its entirety, returned a verdict of "guilty as charged.". At the conclusion of the State's case, the defense called one witness and attempted to qualify him as an expert on the subjects of "obscenity" and "community standards." He failed to qualify and stated no opinion. As a practical appraisal, there was no defense presented.

ARGUMENT

QUESTION ONE: Whether the moving picture film in question is protected by the First Amendment?

Is is suggested and argued by the Petitioner that the motion picture film in question is not utterly without redeeming social value; that it is not patently offensive; and that it follows within the contemporary standards of the community; and does not appeal to prurient interests. Petitioner's counsel has indicated that he "has seen to it that the entire reel of the film in question * * * has been forwarded to the Court for its inspection" and, in fact, requests that the most naive clerk view the film and determine the question of its obscenity.

While the Respondent is in no way endeavoring to thwart or suppress the Court's (and/or the naive clerk's) opportunity to view the film, it is respectfully submitted that a trial de novo at this late date, and in this Court, is not in keeping with the intent and purpose of certiorari.

Section 2905.34 of the Revised Code of Ohio provides, in part, that:

> "No person shall * * * exhibit * * * an obscene, lewd, lascivious * * * motion picture film * * *."

The applicable test for defining obscenity, as existing and applied by the trial court at the time of trial, was the law of

Roth v. *United States*, 354 U. S. 476. In accordance with that test, a motion picture film is obscene when:

> "* * * to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest."

The Ohio Legislature codified this (Roth case) test for obscenity in *Section 2905.371 of the Revised Code of Ohio.* That section provides, in part, as follows:

> "* * * a newspaper, magazine or other publication is obscene if, to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest."

That determination (whether the film is, in fact, obscene) is a question of fact. And, since the Petitioner chose not to be tried by a jury, the trial judge was called upon to perform the duties of a jury and resolve that issue from the evidence presented and in accordance with the applicable law.

The Petitioner does not suggest, in his argument, that the trial judge was not acquainted with the law, or that the trial judge was unfamiliar with, or was incapable of ascertaining, the contemporary community standards, the dominant theme of the motion picture film he viewed in the court room, or its appeal to the average person. The "average person" in the community, necessary for a proper application of the test for obscenity, means that all persons must be taken into consideration. Not just adults. Not just a play-director with two years' experience in the "Playhouse in the Park", (a summertime stage operated in a Cincinnati park). It means all persons—men, women, children, young persons, the aged, the prudish, the immature, the ignorant, the highly educated, the scientific, the worldly

wise, the normal, the abnormal and, in short, all persons from every walk and standard of life.

Petitioner's counsel devotes considerable space to his personal appraisal of the film's context by pointing out that in his opinion there is no total nudity, no erotic dances, no simulation of sexual acts, etc. These observations, or appraisals, on his part do not affect or alter the legal procedural requirement which places the responsibility for determining the issue in a criminal case upon the trier of the facts. In the trial of Petitioner's case, that duty was in the trial judge.

The case of *Redrup* v. *State of New York*, 384 U. S. 916 (decided May 8, 1967), and several other cases are cited by the Petitioner in support of its effort to persuade this Court that it should super-impose its judgment upon that of the trial court and make a determination that the specific motion picture film herein involved should be included within the protection of the First Amendment; that this Court should now make a finding that "Artists' Models" or "Beautease Models" is not obscene as a matter of law.

Justice Brennan (dissenting), at page 448 in *Kingsley Book, Inc.* v. *Brown*, 354 U.S. 436, 77 S. Ct. 1325, stated:

> "A statute which does not afford the Defendant, of right, a jury determination of obscenity falls short, in my view, of giving proper effect to the standard fashioned as the necessary safeguard demanded by the freedoms of speech and press for material which is not obscene. (Of course, as with jury questions generally, the trial judge must initially determine that there is a jury question, i. e., that reasonable men may differ whether the material is obscene)."

And, Justice Learned Hand expressed the same view in *United States* v. *Kennerley*, 209 Fed. 119, 120, as follows:

> "The Court's only power is to decide whether the book

> is so clearly innocent that the jury should not pass upon it at all * * * The same question arises as would arise upon motion to direct a verdict at the close of the case * * * The question here is, therefore, whether the jury might find the book obscene under proper instructions."

It is repectfully submitted that this is the true approach, and true meaning, to what might be called "Constitutional Judgment". In the trial and conclusion to the Petitioner's case, there was sufficient evidence for the trial court to find that the motion picture film came within the prohibition of law.

QUESTION TWO: Whether the absence and/or preclusion of "expert" opinion testimony, on the aspect of obscenity denied Petitioner due process of law and a fair trial.

Although the Petitioner has raised this point as a second question in support of the Petition for Writ of Certiorari, it appears, from the argument submitted, to be merely an extension of the position taken under (its) Question One.

There is no contest to Petitioner's citation of *Friedman* v. *Maryland,* 85 S. Ct. 784, 380 U.S. 51, and which should be correctly cited as *Freeman* v. *Maryland,* and the legal proposition that "First the burden of proving that the film was unprotected expression must rest on the censor." The presumption of innocence, and the burden upon the prosecution to prove its case, in the trial of every criminal case, makes such citation academic. It is claimed that the prosecution merely identified the seized movie, and then rested; and that this then shifted the burden to the defense (to prove the protected qualities of the film). That contention, by the Petitioner, is erroneous.

The prosecution presented evidence of the facts and circumstances leading up to the arrest of the Petitioner, and seizure of the film. The film was identified and was admitted into evidence as an exhibit. Thereafter, the film was projected upon a screen and viewed by the trial judge. It seems elementary to suggest that the trial judge's viewing of such an exhibit would be the only way to apply the law (the test for obscenity) before making a determination of the issues involved in the case.

The Petitioner's premise here is that, in a criminal prosecution for obscenity, the prosecution should be required to present some sort of expert, or opinion, testimony to enlighten the trial judge (or jury) upon the subjects of contemporary community standards and appeal to prurient interests during the trial of the case in chief. That premise is not supported by law, the citation of Justice Frankfurter's comment in *Smith* v. *California,* notwithstanding. Justice Frankfurter's remarks suggest that enlightenment on the subject of moral community standards might be had through *qualified* experts (emphasis added), but that the determination of obscenity rests with the judge or jury. Justice Frankfurter's comment does not establish a requirement that "experts" must be used. (The trial court's exclusion of opinion testimony from the only defense witness called by the Petitioner was based upon his failure to qualify as an "expert" on the subject, or in the field, intended.)

The same argument that the Petitioner makes here was made and rejected in *Kahm* v. *United States,* 300 F. (2d) 78, 84, certiorari denied, 82 S. Ct. 949 (1962). In his opinion, Judge Pope stated:

> "Appellant contends that the Government made no case for the jury because no witnesses were called to testify or give their opinions as to whether the mailed

> material here in question would come within the definition of obscene material stated in *Roth*. The argument is that merely introducing proof that the material was mailed, proving its contents and that such contents were known to the appellant, was not enough. It seems to be appellant's theory that some qualified witness must be produced to furnish expert testimony as to the effect this material would have upon the average person, applying contemporary community standards, and whether to such person this material would have an appeal to prurient interest. It is argued that without that proof and proof as to what were the contemporary community standards there was no case for the jury."

In answering this, Judge Pope said:

> "We do not suggest that such testimony would not have been appropriate or admissible, or that the appellant, if he chose to do so, could not have offered evidence upon the same subject * * * *"

However, as to the claim that the prosecutor was *required* to enlighten the jury during his case in chief, the Court said:

> "It is plain to us that when the jury was instructed by the trial court in language such as that approved by the Supreme Court in the *Roth* case, it was fully capable of applying those standards and that charge to the materials shown to have been mailed here. Nothing is more common than for a jury in a case involving charges of negligence, as for example negligent homicide, to determine whether the proven conduct measures up to the standards of a reasonably prudent man. We think it may fairly be said that no amount of testimony by anthropologists, sociologists, psychologists, or psychiatrists could add much to the ability of the jury to apply those tests of obscenity to the materials here present."

The Petitioner was given a fair trial. A jury having been waived, it became the duty and responsibility of the trial judge to determine the questions of obscenity and the Petitioner's guilt or innocence of the crime charged. There was no denial of due process of law.

QUESTION THREE: Does the First Amendment to the Constitution of the United States of America prohibit the conviction of a corporate entity charged with exhibiting an obscene motion picture, without any showing by the State of any knowledge of managerial agents of said corporation of even the existence of the picture in question, nor any showing of any course of "pandering" conduct or intent upon the part of the corporate entity in relation to either the picture in question or in any manner whatsoever?

The question, as above stated, has been repeated verbatim from Petitioner's brief and, in doing so, Respondent represents to this Court that the question itself is not founded upon the facts established at the trial of the case. The contention made, that there was no showing that the Petitioner's managerial agents had knowledge even of the existence of the film in question, is erroneous. The question presented, however, deals with scienter which Respondent concedes is a necessary ingredient for responsibility to the proscriptions of criminal laws pertaining to obscenity. (It is noted that the Petitioner has, apparently, abandoned its previously made challenge to a corporate entity's responsibilities under criminal laws.)

As evidenced by the record of the trial, the Petitioner's corporate existence was established by introduction of its Articles of Incorporation. It was stipulated that William Berger was employed by the Petitioner in a managerial

capacity and, further, that he was an officer of the corporation. Evidence was adduced that the Petitioner was licensed by the City of Cincinnati to engage in the motion picture theater business at 282 West McMicken Avenue, in said city (the same address in which the subject film was being shown on the date of the offense). The applications for the licenses issued to Petitioner were made by William Berger, Secretary-Treasurer. It was further stipulated that Mr. Berger, as one of Petitioner's officers and employed in a managerial capacity, advertised the showing of the film in question by placing advertisements in a local newspaper. The ads themselves were admitted into evidence without objection. At the time of the offense, the Petitioner's theater was open to the general public and in full operation through several of its employees. The film was shown, and was viewed by the arresting officers, on two dates — June 12, 1963 and on June 13, 1963. The defense, at the trial, established nothing to the contrary.

In light of the above facts established at the trial, it is respectfully submitted that Petitioner's claim of a failure of proof (of scienter) is totally without substance.

As cited by the Petitioner, the case of *Smith* v. *California*, 361 U.S. 147, 80 S. Ct. 215, clearly reflects the law on the subject. At page 154, this Court stated:

> "It is argued that unless the scienter requirement is dispensed with, regulation of the distribution of obscene material will be ineffective, as booksellers will falsely disclaim *knowledge of their books' contents* or falsely deny reason to suspect their obscenity. We might observe that it has been some time now since the law viewed itself as impotent to explore the actual state of a man's mind. See Pound, The Role of the Will in Law, 68 Harvard Law Review 1. Cf. *American Communications Association* v. *Douds*, 339 U.S. 382, 411, 94 L. Ed. 925, 950, 70 S. Ct. 674. Eyewitness

> testimony of a bookseller's perusal of a book hardly need be a necessary element in proving his *awareness of its contents.* The circumstances may warrant the inference that he was aware of what a book contained, despite his denial." (Our emphasis.)

And, at page 161, Justice Frankfurter, addressing himself to a bookseller's refusal to face the facts, stated:

> "No less obviously, the Court does not hold that a bookseller who insulates himself against knowledge about an offending book is thereby free to maintain an emporium for smut."

See also *Rosen* v. *United States,* 161 U.S. 606 (1896).

When considering the evidence in this case, it is submitted that it was sufficient to establish the ingredient of scienter. Evidence of a similar nature was found sufficient to support a finding of scienter in *United States* v. *Samuel R. Hochman,* 277 F. (2d) 631 (1960), *certiorari denied,* 364 U.S. 837, 81 S. Ct. 70, (October 10, 1960), *rehearing denied,* 364 U.S. 906, 81 S. Ct. 231 (November 21, 1960). See also, *U. S.* v. *Roy A. Oakley,* 290 F. (2d) 517 (1961), *certiorari denied,* 368 U.S. 888, 82 S. Ct. 139, *rehearing denied,* 368 U.S. 936, 82 S. Ct. 358; *Harold S. Kahm* v. *United States,* 300 F. (2d) 78 (1962), *certiorari denied,* 369 U.S. 859, 82 S. Ct. 949.

QUESTION FOUR: Does Ohio's statutory definition of obscenity (O.R.C. 2905.371) which does not provide for any consideration of redeeming social importance or patent offensiveness offend the First Amendment to the Constitution of the United States?

In 1961 the Ohio Legislature acted to incorporate into *Section 2905.371, of the Revised Code of Ohio,* the definition of "obscene" which was approved by the majority

opinion in the *Roth-Alberts* case. That section of the Ohio Revised Code reads, in part, as follows:

> "* * * * A * * * * * publication is obscene if, to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest."

That section, and its definition, applies to the word "obscene" used in *Section 2905.34, of the Revised Code of Ohio,* under which the Petitioner was prosecuted.

The Petitioner now claims that, because of the language cited from this Court's per curiam opinion in *Redrup* v. *New York,* decided May 8, 1967, the constitutional test of the *Roth* case has been invalidated. It is argued that additional elements have been added as a result of the various cases cited on page 20 of Petitioner's brief. It is observed that the decisions reached in many of the cases cited (*Manual Enterprises, Inc.* v. *Day,* 370 U.S. 478, 82 S. Ct. 1676; *Grove Press, Inc.* v. *Gerstein,* 378 U.S. 577, 84 S. Ct. 1903), as well as many additional cases not cited, reflect a common disagreement between the various justices.

It is a basic postulate of our case law system that the decision of a majority determines the result, and an "opinion of the court" expresses the reasoning agreed upon by that majority. Where a majority agree upon the result, but do not agree upon the reasoning for the result, there is no "opinion of the court" even though the controversy is ended between the litigant parties.

The decision and the reasoning found in the "opinion of the court" determine the precedent value of any particular case. It is submitted that in many obscenity cases there have been no "opinions of the court"; the majority having agreed *only* upon the result, but not upon the supporting reasoning.

In *Wambaugh, The Study of Cases* (Second Edition, 1894) at page 50, the text states:

> "Even when all the judges concur in the result, the value of the case as an authority may be diminished and almost wholly destroyed by the fact that the reasons given by the several judges differ materially * * * * 'There must be a concurrence of a majority of the judges upon the principles, rules of law, announced in the case, before they can be considered settled by a decision.' "

And in *Black, Handbook of Judicial Precedent* (1912), page 135-136:

> "If all or a majority of the judges concur in the result * * * * but differ as to the reasons which lead them to this conclusion, the case is not an authority except upon the general result."

It is respectfully submitted that the no clear majority decisions, and the separate pronouncements of the individual justices in their individual opinions, in the cases cited by the Petitioner, indicate no intent on the part of this Court to depart from the express holdings of the *Roth* case and its definition of "obscene".

In *Jacobellis* v. *Ohio,* 84 S. Ct. 1676, Justice Brennan expressed reaffirmance of *Roth,* and Justice Goldberg concurred (page 1680). At page 1685, Chief Justice Warren, who was joined by Justice Clark, said:

> "In light of the foregoing, I would reiterate my acceptance of the rule of the Roth case * * * *"

Justice Harlan adhered to his view of separate tests for state and federal cases by stating, at page 1686, of his opinion in *Manual Enterprises, Inc.* v. *Day*:

> "As to the States, I would not prohibit them from banning any material which, taken as a whole, has been reasonably found in state judicial proceedings to treat sex in a fundamentally offensive manner, under rationally established criteria for judging such materials * * * *"

Justice White concurred in the judgment and did not indicate his views, but voted with Justices Warren, Clark and Harlan to deny certiorari in *Grove Press, Inc.* v. *Gerstein* (*supra*) and *Tralins* v. *Gerstein* which used the *Roth-Alberts* standards.

It is respectfully submitted that the *Roth* test has not been invalidated or amended by the decisions of any of the cases cited; and that Ohio's statutory definition is in no way violative of the provisions of the First Amendment to the Constitution of the United States.

QUESTION FIVE: On an appeal which raises the constitutional question of the specific obscenity of a given motion picture, did the procedures followed in this cause, to-wit, the Supreme Court of Ohio dismissing the said appeal as raising no substantial constitutional question, without ever allowing the submission or certification of the motion picture itself to it, violate the First and Fourteenth Amendments to the United States Constitution?

The Respondent respectfully submits that the answer to Petitioner's fifth question is, likewise, "no". It is contended, by the Petitioner, that its rights under the First and Fourteenth Amendments were violated by reason of the Ohio Supreme Court's dismissal of the appeal to that court on the basis of no substantial constitutional question; and that the Ohio Supreme Court should have viewed the film and made its own determination concerning "com-

munity standards and obscenity" as against "constitutional protection."

The Petitioner has claimed "constitutional protection", under the First Amendment in the various motions argued prior to, during and after the trial, and in each of the appellate courts of the state. In each instance, and upon full consideration of the arguments presented, as well as the law, that claim was denied.

It is respectfully submitted that the issue, on appeal, is a limited one. The pre-*Roth* precedents, as well as the *Roth* test (by its very definition) pose the matter as being a question of fact for determination by a jury (or, as in this case, the trial court by reason of the Petitioner's waiver of a jury).

In *United States* v. *Kennerly*, 209 F. 119, Judge Learned Hand made it abundantly clear that the determination of obscenity was fundamentally a jury question. He drew an analogy to the jury question and standard of care in negligence cases. He expressed this opinion again in *United States* v. *Levine*, 83 F. (2d) 156 (cited by this Court in *Roth* as being consistent with the obscenity law in the *Roth* decision). Only if the publication could not, by any reasonable judgment, be held to come within the prohibition of the law, then it becomes the duty of the (trial) court to pass upon it as a matter of law. *United States* v. *Journal Co.*, 197 F. 415. The (trial) court, on demurrer, was required to decide whether the publication was so clearly innocent that a jury should not pass upon it at all. *United States* v. *Klauder*, 240 F. 501. But, where reasonable minds might fairly reach different conclusions as to the character of the publication, the determination of "obscene" becomes a question of fact. Where the trial is by a jury, their determination must be preceded by proper instruction.

The Petitioner, however, waived its right to a trial by

jury and elected, instead, to have the trial judge perform that (the jury's) function. Accordingly, the trial judge was placed in a dual role, but he was governed by the same principles of law. In his role as "trier of the facts" it was his duty, as would have been the jury's, to apply the law (the test) to the facts presented.

The Seventh Amendment to the Constitution of the United States provides that:

> "* * * * The right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined by any Court of the United States, than according to the rules of the common law".

This Court stated, in *Chicago B. & O. R. Co.* v. *Chicago*, 166 U.S. 226, 17 S. Ct. 581, that:

> "It is clear that the last clause of the seventh amendment, is not restricted in its application to suits at common law tried before juries in the courts of the United States. It applies equally well to a case tried before a jury in a state court, and brought here by writ of error from the highest court of the state."

It appears that the first voice to sound a seemingly different rule was that of Justice Harlan in his concurring opinion in *Roth-Alberts*. Without citation, Justice Harlan expressed his "constitutional judgment" review in the following language:

> "If 'obscenity' is to be suppressed, the question whether a particular work is of that character involves not really an issue of fact but a question of constitutional judgment of the most sensitive and delicate kind * * * * In short, I do not understand how the Court can resolve the constitutional problems now before it without making its own independent judgment upon the character of the material upon which these convictions were based."

This, no doubt, was the forerunner of the quote from *Jacobellis* v. *Ohio* (cited by Petitioner on page 21 of its brief). Yet, in that same case Justice Harlan stated:

> "The more I see of these obscenity cases the more convinced I become that in permitting the States wide, but not federally unrestricted scope in this field, while holding the Federal Government with a tight rein, lies the best promise for achieving a sensible accomodation between the public interest sought to be served by obscenity laws * * * * and protection of genuine rights of free speech.
>
> * * * * As to the States, I would make the federal test one of rationality. I would not prohibit them from banning any material which, taken as a whole, has been reasonably found in state judicial proceedings to treat with sex in a fundamentally offensive manner, under rationally established criteria for judging such material."

Jacobellis was a no-majority decision (there was no opinion of the court). See also *Grove Press, Inc.* v. *Gerstein,* 378 U.S. 577, 84 S. Ct. 1909; *Tralins* v. *Gerstein,* 378 U.S. 576, 84 S. Ct. 1903; *California* v. *Williamson,* 377 U.S. 994, 84 S. Ct. 1902; and *Fried* v. *New York,* 378 U.S. 578, 84 S. Ct. 1904. (It is to be noted that Justice Brennan voted to deny certiorari in the *Williamson* case, which involved a criminal trial, but voted to grant certiorari in the *Grove Press* case, a civil proceeding.)

CONCLUSION

The Respondent respectfully submits that the Petition for Writ of Certiorari, filed herein, has not presented any substantial federal question; that the judgment rests upon an adequate non-federal basis; and that the within appeal should be dismissed.

Respectfully submitted,

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